given by the 7th plaintiff to the defendant company to rescind the contract. The contract was a conditional contract. Then again clause 9(a) provides that save, *inter alia*, for clause 7 (just mentioned) "should the vendor for any other reason whatsoever be unwilling to sell (the said portion of land) to the purchaser, then the purchaser shall be entitled to an action for specific performance". This clause reinforces the conditional nature of the contract - the condition that approval for subdivision leading to a separate title for the sold property should be obtained within 4 years from the date of the agreement - and if that condition is not fulfilled there cannot be specific performance. In any event the plaintiff has not explained why he allowed 16 years to pass before he decided to sue for specific performance against the defendant company. The Court does not even know if the portion of land he bought is comprised in Surat Putus 16703, Lot 263 (registered in the name of the defendant company on 20 April 1980) or in Surat Putus 16706, Lot 318 (registered in the name of Tan Ah Bee on 15 May 1979 as trustee). In my view the 7th plaintiff is not entitled to the injunction.

In the result the injunction granted to the plaintiffs is discharged. Costs to the defendant company.

MALAYSIAN SOIL INVESTIGATION SDN. BHD.

v.

EMKO HOLDINGS SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHAMD J.
[COMPANIES WINDING-UP NO. D5-28-75-93]
18 AUGUST 1993

COMPANY LAW: Judgement in default of defence - Petition for winding up - Whether procedures complied with - Notice of demand - Companies Act 1965, s. 218 - Whether notice and service bad - Whether notice complied with judgement - Effect of non-compliance with notice.

LIMITATION: Interest due on judgement calculated for more than seven years - Whether claim statute barred - Limitation Act 1953, s. 6(3) - Essence of claim for interest.

WORDS & PHRASES: "Recovered" - Limitation Act 1953, s. 6(3).

The petitioner obtained a judgement in default of defence against the respondent on 17 August 1987 for RM73,019.00 "together with interest thereon at the rate of 8% per anum from 20 May 1985 until full settlement and RM225 costs". On 10 December 1992, the petitioner issued a notice under s. 218 of the Companies Act 1965 demanding that the respondent pay the judgement sum together with interest of RM44,131.40 which the petitioner calculated from 20 May 1985 to 10 December 1992, and "a further interest at the rate of 8% per anum from 11 December 1992 to the date of realisation". The notice gave the respondent the statutory three weeks within which to submit payment. The respondent failed to comply with the notice and on that ground it was deemed unable to pay its debts. On 1 April 1993 the petitioner served the respondent with the petition and thereafter proceeded to make the relevant advertisements both in the newspaper and the Government Gazette.

On 4 June 1993, some five months after the expiry of the prescribed time set in the notice, the respondent tendered payment to the petitioner in the amount of RM 85,260. The petitioner refused the tender on the ground that the amount tendered was not the right amount.

In their opposition to the petition, the respondent raised the following objections:

(1) That the petition could not be based on the alleged inability of the respondent to pay its debts;
(2) That the notice of demand and its service were bad and of no effect;
(3) That the petitioner was claiming more than the judgement sum due; and
(4) That interest on the judgement sum had been calculated for more than six years and as such the claim for interest contravened the provision of s. 6(3) of the Limitation Act 1953.

Held:

[1] There is absolutely no evidence to substantiate the bare allegations of the respondent that both the notice and its service were bad. The notice had given the respondent twenty one days to make payment in line with the relevant provision pursuant to which it was sent and as no payment had been made within three weeks, the respondent was therefore deemed to be unable to pay its debts.

[2] The notice in this case was based on a judgement "with interest thereon at 8% per anum from 20 May 1985 until full settlement" and therefore it was quite in order to include the interest and its arrears. As the amount claimed in the notice had complied with the amount in the judgement, the petitioner was claiming what was due in the judgement.

[3] Interest due on a judgement continues to be due until full payment is made. The Act certainly does not prohibit the payment of the arrears of interest due on the judgement debt beyond the six years after they become due as long as the act of recovery is made before the expiry of the six year period.

[Petition granted as prayed].

Cases referred to:

Deputy Commissioner of Taxation v. Cye International Pty. Ltd. (No. 2) [1985-86] ACLR Vol. 10 305 ***(dist)***

Re Perusahaan Jenwatt Sdn. Bhd. [1990] 2 MLJ 178 ***(dist)***

Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd. [1992] 1 MLJ 313 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218
Limitation Act 1953, s. 6(3)

For the petitioner - Jadadish Chandra; M/s. Arbain Chandra Chew & Associates
For the respondent - Joseph Yeo; M/s. Joseph Yeo & Logan Sabapathy
For the official assignee - Nor Risan

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:

This petition filed on 15 March 1993 is based on a judgment in default of defence obtained on 17 August 1987 in Kuala Lumpur High Court Civil Suit P24-429-86 against the respondent for RM73,019 with interest and costs. The relevant judgment reads

> No defence having been served by the defendant herein, it is this day adjudged that defendant do pay the plaintiff RM73,019 together with interest thereon at the rate of 8% per annum from 20 May 1985 until full settlement and RM225 costs.

The relevant notice of demand under s. 218 of the Companies Act 1965 had been issued on 10 December 1992 and as far as the petitioner was concerned, since no payment had been made in the prescribed three weeks thereafter, the respondent, which was incorporated on 6 September 1983, was deemed to be unable to pay its debts. Service of the petition had been effected on 1 April 1993 and the relevant advertisements had been made in the New Straits Times and in the Malay Mail both on 16 April 1993 and in the Government Gazette on 29 April 1993.

The respondent in their affidavit in opposition filed on 16 June 1993 had raised a number of objections to the petition. Firstly, they had insisted that the petition cannot be based on the alleged inability of the respondent to pay its debts as having been served with the prescribed notice, which they maintained were both as regards the service and the notice invalid and of no effect, they had on 4 June 1993 tendered payment to the petitioner vide Malayan Banking Berhad cheque No. 844338 for RM85,260 made up of the judgment sum of RM73,019 together with interest at 8% per annum amounting to RM12,016 calculated up to 10 June 1993 and costs of RM255, according to their affidavit, and costs of RM225, according to the letter tendering the payment and attached as an exhibit to the affidavit. The total tendered seems to suggest that the amount of costs stated in the affidavit is not correct and the amount in the letter tendering the payment is but this of

course is a mere typographical problem not relevant to the decision arrived at.

Secondly, they had contended that the words "further interest at the rate of 8% per annum from 11 December 1992 to the date of realisation" appearing in the notice must mean that the petitioner is actually claiming more than the judgment sum due. On this point, learned Counsel for the respondent had referred to the Australian authority of *Deputy Commissioner of Taxation v. Cye International Pty. Ltd.* (No. 2) [1985-86] ACLR Vol. 10 305 which he said had been followed by the High Court here in *Re Perusahaan Jenwatt Sdn. Bhd.* [1990] 2 MLJ 178 and approved in the Supreme Court here in *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd.* [1992] 1 MLJ 313.

Further, he had argued that interest had been calculated for more than six years, namely from 20 May 1985 to 10 December 1992 in contravention of s. 6(3) of the Limitation Act 1953 (hereinafter "the Act"), even discounting the further interest after the date of the notice. It is pertinent at this stage to reproduce the relevant paragraph in the respondent's affidavit on this point which reads:

> I respectfully state that the sum of RM12,016 is interest on the judgment sum of RM73,019 calculated from 20 May 1991 until 10 June 1993. I am advised and verily believe that no interest is recoverable after 6 years.

There appears to be some confusion here on the part of the respondent and their learned Counsel as this averment of the respondent seems to suggest that interest is not chargeable in the first six years namely from 20 May 1985, as in the judgment, up to 19 May 1991 and that is why only the period from 20 May 1991 to 10 June 1993 had been calculated for their payment to the petitioner. However, their learned Counsel in his submission seems to argue that interest is chargeable only up to the six year limit namely from 20 May 1985 to 19 May 1991. The Court can, however, deduce that the assertion of learned Counsel for the respondent is more in line with the limitation provision referred but this only results in that relevant paragraph of the respondent's affidavit to be incorrect, the calculation of interest a mistake and the cheque to be not in order in any case.

Learned Counsel for the petitioner had retorted that the Australian case cited was not relevant as in that case there was no judgment on which the petition was based while the High Court case referred was irrelevant as the judgment sum in the notice there was clearly in error being ten times the actual sum due on the judgment. As for the Supreme Court decision, learned Counsel had argued that it was not applicable here as the appeal had been dismissed in that matter. Concerning the six year limitation period, learned Counsel had submitted that there is actually no limitation to the charging of interest and that they would have accepted the payment made by the respondent if the right amount amounting to RM120,007.25 had been tendered.

It is pertinent at this point to recapitulate on the objection of the respondent. As for the invalid notice and service, having perused the relevant documents in this matter, it was my conclusive finding that the papers are in order and the notice had complied strictly with the judgment on which the petition is founded. There is absolutely no evidence to substantiate the bare allegations of the respondent that both the notice and its service were bad in the light of the affidavit of service tendered in support of the petition. The judgment in default of defence had clearly stated that the respondent is liable for RM73,019 "together with interest thereon at the rate of 8% per annum from 20 May 1985 until full settlement" and the notice had stated that the judgment sum is due "together with interest thereon totalling RM44,131.40 as at 10 December 1992" and "further interest at the rate of 8% per annum from 11 December 1992, to the date of realisation". The notice had given the respondent twenty one days to make payment in line with the relevant provision pursuant to which it was sent and as no payment had been made within three weeks, the respondent was therefore deemed to be unable to pay its debts.

Concerning the issue that the petitioner was claiming more than the sum due on the judgment, it is proper to take a closer look at the three authorities cited. In *Deputy Commissioner of Taxation v. Cye International Pty. Ltd.* (No. 2) [1985-86] ACLR Vol. 10 305, it was the Deputy Commissioner of Taxation who had made the notice of demand incorporating a claim for interest at the rate of 20% per annum until payment. Unlike this case where the notice was based on a judgment "with interest thereon at the rate of 8% per annum from 20 May 1985 until full settlement" and therefore it was quite in order

to include the interest and its arrears, the Australian case is not based on any judgment granting interest and the interest had been added arbitrarily by the Deputy Commissioner of Taxation. The facts, therefore, can be distinguished and certainly are not appropriate to bind the situation in our case.

As for *Re Perusahaan Jenwatt Sdn. Bhd.* [1990] 2 MLJ 178, the judgment debt was RM25,987.50 plus interest at the rate of 8% per annum from the date of judgment to the date of realisation, amounting to RM29,584.46, and costs of RM225 but the notice of demand had stated RM295,584.46, a sum clearly in error because it was RM266,000 more. The principle in *Deputy Commissioner of Taxation v. Cye International Pty. Ltd.* (No. 2) [1985-86] ACLR Vol. 10 305 was therefore applied, quite correctly, but it must be stressed that in *Re Perusahaan Jenwatt Sdn. Bhd.* [1990] 2 MLJ 178, the amount claimed in the notice had not complied with the amount in the judgment unlike the position of affairs in this case.

Finally, in *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd.* [1992] 1 MLJ 313, the Supreme Court had approved *per curiam* the principle in the earlier two authorities but had in any case dismissed the appeal there as it had held that the notice of demand was in order and the company wound up had neglected to comply with the said notice within three weeks, which is in fact similar to the set of circumstances in this case.

It is also appropriate at this juncture, in view of the submission of interest not being repayable after the limitation period of six years, to discuss s. 6(3) of the Act which reads:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and **no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due**
> (the emphasis is mine).

At first reading, the underlined second limb seems to create the impression that arrears of interest in respect of any judgment debt cannot be repayable after the expiration of six years from the date the interest became due meaning that they can only be paid for the six years after becoming due, which is the basis of learned Counsel for the respondent's contention, but actually this is an erroneous impression and the correct interpretation should be that one cannot take action to recover the arrears of interest AFTER six years had lapsed from the time they became due. The crucial word in the second limb is therefore "after" to denote that any act of recovery of the arrears of interest must be before the limitation period of six years had expired and "recovered" should mean "claimed" and cannot be held to mean "repayable". In the instant case, the judgment was about two years and three months after it became due and was therefore well within the limitation period. The interpretation given on the erroneous impression would create a mockery of sorts as all judgment debtors would take their own sweet time to pay the judgment debt when in actual fact the purpose of interest is to speed up and not to delay payments.

It is abundantly clear that in the notice, the petitioner had calculated the interest due until the date of the notice itself with further interest at the same rate the day after until full settlement and the essence of the matter in both the judgment and the notice, like in all Court judgments, is that interest continues to be due until full payment is made. The Act certainly does not prohibit the payment of the arrears of interest due on the judgment debt beyond the six years after they become due as long as the act of recovery is made before the expiry of the prescribed six years.

Since the papers were in order and the objections lacked merit, I had accordingly granted the petition as prayed.